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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

INTERNATIONAL SPACE OPTICS, S.A.,

Plaintiff, Cross-defendant and Appellant,

v.

DONALD HAMASAKI,

Defendants, Cross-complainant and Appellant;

PAUL HAMASAKI et al.,

Defendants and Respondents;

ROBERT FOX et al.,
Cross-defendants and Appellants.

G045656

(Super. Ct. No. 07CC04325)

O P I N I O N

Appeal from a judgment and postjudgment order of the Superior Court of Orange County, David C. Velasquez, Judge. Affirmed.

Law Office of Richard A. Harvey and Richard A. Harvey for Plaintiff, Cross-defendant, and Appellant International Space Optics, S.A., and for Cross-Defendants and Appellants Robert Fox and Yoshiko Oswald.

Law Offices of Stephen M. McNamara and Stephen M. McNamara for Defendant, Cross-Complainant, and Appellant Donald Hamasaki.

Alpert, Barr & Grant and Adam D.H. Grant for Defendants and Respondents Paul Hamasaki and Scott Hamasaki.

Law Office of Diane Goldman and Diane Goldman for Defendant and Respondent Joni Hamasaki.

* * *

Plaintiff International Space Optics, S.A. (ISO) alleged that defendant Donald Hamasaki breached his fiduciary duty to ISO by directing business opportunities to entities in which Donald had a material financial interest.[1] Moreover, ISO alleged Donald and several of Donald's relatives who had obtained employment at ISO (defendants Paul Hamasaki, Scott Hamasaki, and Joni Hamasaki) utilized petty cash, company credit cards, and company travel advances for their own personal expenses. The Hamasakis countered that there was no wrongdoing, that ISO consented to all transactions at issue, and that the instant lawsuit was really about controlling shareholder Yoshiko Oswald trying to wrest control of Donald's shares in ISO. Donald filed a cross-complaint for defamation, breach of fiduciary duty, and unjust enrichment against ISO, Yoshiko, and Yoshiko's son, Robert Fox.

A jury returned a special verdict resulting in a spectacular victory for the Hamasakis: (1) a defense verdict on the complaint; and (2) approximately $2 million in

[1] We will use first names to identify most of the individuals involved in this case because of shared last names.

damages to Donald on the cross-complaint. The court reduced Donald's damages to approximately $300,000 and refused to rule that Yoshiko was an alter ego of ISO, but awarded the Hamasakis their attorney fees pursuant to Corporations Code section 317. ISO, Yoshiko, and Fox appealed the judgment and Donald cross-appealed the judgment. We affirm the judgment in all respects and affirm the order denying an amendment of the judgment to name Yoshiko as an alter ego judgment debtor.

FACTS

Operative Pleadings

ISO filed its initial complaint in March 2007.[2] In the operative fourth amended complaint, filed in April 2008, ISO claimed the Hamasakis "systematically looted ISO." ISO alleged it suffered $2,336,787.38 in damages as a result of conversion by the Hamasakis. ISO also alleged that Donald breached his fiduciary duty to ISO, resulting in unspecified damages that apparently overlapped with the alleged harm specified in the conversion cause of action. ISO named additional defendants and stated causes of action for constructive trust and unfair competition, but these parties and causes of action do not appear to be relevant on appeal.

After a series of partly successful demurrers by various defendants to ISO's successive complaints, Donald filed an answer and cross-complaint on December 4, 2008. The cross-complaint named as cross-defendants ISO, Yoshiko, and Fox. Donald asserted multiple causes of action, including defamation against Fox, breach of fiduciary duty against Fox and Yoshiko, and unjust enrichment against ISO. In June 2009, Donald filed his operative second amended cross-complaint, which contained similar allegations of defamation, breach of fiduciary duty, and unjust enrichment.

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[2] ISO did not provide this court with a copy of the initial complaint.

Establishment and Operation of ISO

Yoshiko wrote down (at some unspecified point in time) a description of meetings from 1983 to 1998 about the creation and management of ISO. These notes were subsequently typed and labeled as corporate minutes.[3] The initial entry in the minutes indicates Yoshiko and her husband Robert Oswald, along with businessman Hirosuke Fujiwara, contemplated teaming up to sell lenses in the United States; Donald was not mentioned at this initial March 1983 meeting. Instead, the Oswalds thought they would use their preexisting Thorobred Photo Service company (Thorobred) as headquarters. A few months later, it was noted that "Bob Oswald recommends not using [the] Thorobred . . . office as headquarters. He suggests bringing in Don[ald] and using his office in Southern California as headquarters." Robert based this recommendation on repair work done for Thorobred by Donald. In 1984, the Oswalds and Fujiwara discussed offering Donald 30 percent of the company stock to participate in ISO, with the sales office to be located in Huntington Beach, California. At a June 12, 1984 meeting, the shareholders agreed to terms with regard to their responsibilities and duties. Fujiwara would purchase lenses from a Japanese firm. Yoshiko would handle issues pertaining to credit, customs, communications with Japan, and financial start-up costs. Donald would open and manage a sales office in Huntington Beach.

Thus, in 1984, four individual shareholders — Robert and Yoshiko Oswald (40 percent), Donald Hamasaki (30 percent) and Hirosuke Fujiwara (30 percent) — established ISO. When her husband Robert died in 1998, Yoshiko took control of 40 percent of ISO. At some unspecified point in time, Yoshiko purchased Fujiwara's shares. Thus, at the time of trial, Yoshiko owned 70 percent and Donald owned 30 percent of ISO. According to notes taken by an accountant during a meeting with ISO representatives during the litigation, "A goal is to get Don's stock back."

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[3] These "minutes" were received in evidence by stipulation of the parties.

The Oswalds were officers and directors of ISO. Donald was a director and the sole employee of ISO in California for several years, working without pay to establish ISO as a successful business. In 1990, Donald hired Paul to run the day-to-day operations at ISO. Paul reported to Donald and Yoshiko. Joni was hired in the late 1980s and rose to the position of office manager in 1995. Scott started working at ISO in 2000 as international sales manager. In 2005, Yoshiko replaced Paul with her son, Fox, as general manager of ISO. Yoshiko and Fujiwara removed Donald as a director in November 2005. Scott resigned from ISO in February 2006.

The minutes from 1984 to 1998 (written by Yoshiko, not necessarily contemporaneously with the purported meetings) consistently expressed concern with two issues: (1) Donald not paying his required $30,000 initial capital contribution; and (2) the separation of ISO operations from those of Imtek Corporation (Imtek) and FaxPress Corporation (FaxPress). The minutes clearly reflect an awareness on the part of ISO that the operations of ISO were intertwined with Imtek and FaxPress (e.g., 1985 – "ISO operations must be separated from that of the IMTEK Corporation"; 1987 — "The IMTEK Corporation's bookkeeper is the same as ISO's"; 1989 — "Fax press, Inc. and Sun Utility Corporation (owned by Don[ald], Paul . . ., and others) occupied 40% of the ISO building"; 1989 — "The ISO Corporation must be separated from IMTEK and Fax press"; 1996 — "ISO should not co-mingle with companies Don[ald] and Paul . . . own").

Imtek and FaxPress

Imtek was established in 1974. Through 2005 (at which point Imtek was sold), Donald and Paul (along with another individual) were the principal shareholders, officers, and directors of Imtek. Imtek modified and repaired lenses and cameras to ensure compatibility with a customer's equipment. Imtek was the firm that provided services to Thorobred, bringing Donald to the attention of the Oswalds as a potential business partner in the creation of ISO.

FaxPress sold office supplies. Donald and Paul were FaxPress shareholders; Paul was the President of FaxPress. ISO purchased office supplies from FaxPress. Indeed, Yoshiko received direct shipments of FaxPress thermal paper whenever she asked Joni to order fax paper for Yoshiko's home office in Nevada.

ISO's minutes (prepared by Yoshiko) from 1988 and 1989 acknowledged that Paul owned shares in and managed Imtek and FaxPress, and that Donald and Paul owned FaxPress. A 1988 letter written by Paul to Yoshiko on Imtek letterhead asked Yoshiko to approve of the following arrangement: "ISO compensate 1/4 of Don[ald]'s salary ($1500.00/month) to relieve IMTEK of some burden."

According to Donald's testimony, ISO began its operations at Imtek's headquarters and used Imtek's offices and warehouses (rent free initially) to conduct business. Imtek did all lens repair and lens modification work for ISO. Imtek also performed other administrative and promotional services for ISO during ISO's start-up period. ISO operated for 10 years before it hired any of its own employees capable of making repairs to the products sold by ISO. This arrangement would have been apparent to anyone visiting ISO. The Oswalds visited ISO during this early time period and Yoshiko walked through the facilities. For nearly 10 years, Imtek provided repair services to ISO without charge.

ISO (by the authority of Paul) and Imtek (by an individual named Lindy Nagayama) entered into service agreements in 1994, 1995, and 1996. These service agreements set out fee schedules and Imtek's responsibilities in providing modification and repair services for ISO. Even when Imtek began charging ISO, Imtek charged ISO less for its services than Imtek charged its other customers.

ISO's Alleged Damages

ISO's case amounted to presenting an accounting of more than a decade of ISO expenditures and casting doubt on the propriety of the expenditures by noting the

Hamasakis were in a position to benefit thereby. ISO pointed to five different categories of expenditures by ISO under the authority of the various Hamasakis.

Most of ISO's alleged damages pertained to $1,615,754.17 paid by ISO to Imtek from 1993 (which is apparently when Imtek began charging ISO for services rendered) through 2005. Exhibit 3, compiled by ISO, features a spreadsheet cataloging the payments to Imtek as well as backup copies of the checks. For the most part, Donald and an individual named Pat Takamoto signed the checks from 1993 through 2002, while Joni signed the checks from 2002 to 2005. Other voluminous exhibits feature invoices for work performed by Imtek for ISO, as well as some invoices sent by ISO to its customers for repairs/modifications that match up with some of the work done by Imtek. There is no summary exhibit linking the Imtek or ISO invoices to particular checks made out to Imtek by ISO. ISO did not introduce evidence suggesting the rates paid by ISO were not fair and reasonable or that Imtek did not actually perform technical work for ISO. Yoshiko testified that her first awareness of the Imtek transactions came in 2006.

ISO also asserted it was harmed by $81,800.09 paid by checks to FaxPress from 1993 to 2000. Exhibit 9 features a spreadsheet cataloging the payments and copies of the checks. For the most part, Donald and Takamoto signed these checks. There is no effort in the record by either party to delve into particular ISO-FaxPress transactions to evaluate the fairness and reasonableness of each transaction. In her testimony, Yoshiko claimed she first became aware of the FaxPress transactions in 2006.

Next, ISO identified $126,455.37 in checks written to petty cash from 1993 to 2004. These checks were signed by Takamoto, Donald, and Joni at various times. The gist of ISO's argument with regard to these expenditures is that the petty cash fund was abused by the Hamasakis. But there is no proof that any particular petty cash was used by the Hamasakis for personal expenditures. Joni testified she used petty cash to pay for business expenses. Employee Raymond Hui testified he prepared checks from petty cash to pay for Yoshiko's expenses, to pay for informal employee cash bonuses ("spiffs"), to

buy lunches for employees, and to pay for employee birthday party expenses. In his deposition, Hui testified there was backup documentation for every petty cash expenditure.

The jury also was presented with voluminous documents detailing Joni's use of the company credit card. These documents include numerous entries in which the expenditures appear to be personal rather than business related (e.g., charges incurred at restaurants, clothing stores, and grocery stores). But there are also copies of some checks from Joni to ISO reimbursing ISO for personal expenditures on her company credit card. According to Fox's accounting, he questioned $84,064.81 of Joni's expenditures. Joni testified she used the company credit card to purchase office supplies, food for the ISO office, and gifts for ISO employees. Joni also made vendor payments on the credit card. Joni used the credit card for personal expenses, but no one ever informed her that this was improper. Joni wrote a monthly check to ISO each time she made personal purchases on the company credit card. Yoshiko signed the application for the credit card account. Yoshiko was told about Joni's use of the credit card; Yoshiko raised no objections to Joni's practices.

Finally, ISO submitted an exhibit demonstrating that $77,236.70 was paid to Scott from 2000 to 2005 for travel expenses. Joni signed almost all of these checks. Scott's duties at ISO required extensive travel. Employee Hui testified that he had not received receipts from Scott to support the reimbursement of $41,041.83 of these expenses. Hui kept detailed records of all of Scott's travel expenditures and reimbursements. Hui followed Joni's order to simply continue waiting until Scott turned in the necessary receipts. As far as Scott remembers, he turned in all necessary receipts.

Evidence Pertaining to Donald's Defamation Claim

As noted above, ISO's initial complaint was filed in March 2007. In April 2007, ISO issued two press releases entitled "Orange Co. Embezzlement/Conspiracy Suit

Seeks $1.95 Million" and "Rainbow CCTV Sues Former Management For $1.95 Million."[4] Fox prepared these documents, which are identical with the exception of the titles. The text of the press releases purports to summarize the contents of the initial complaint,[5] names the various defendants (including Donald), and provides information about ISO. The press releases describe the factual allegations of the complaint as allegations, not established facts. For instance, the press releases state: "The suit alleges that the defendants conspired to falsify, manipulate, and exploit ISO/Rainbow's financial records, statements, accounts, reports, invoices, payroll, petty cash, rent, expenses, income, assets, liabilities, personal/business expenses, and inventory to their own advantage." The press releases conclude with the following two sentences: "The suit is the result of a 17 month internal investigation by current ISO/Rainbow General Manager Bob Fox and Controller Doug Bailey and an independent forensic audit conducted by . . . Haynie & Company, CPA's of Newport Beach. Both the internal investigation and forensic audit are expected to continue."

The June 2007 issue of Security Systems News, the self-proclaimed "newspaper of record for the security system integrator & installer," featured an article entitled "Rainbow CCTV sues former management." In addition to describing the lawsuit (in much the same terms as the press releases), the article featured an interview of Fox. We quote this portion of the article in detail: "Robert Fox, currently Rainbow general manager, said 'we made the decision to file the lawsuit pretty much when I took

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[4] ISO does business as "Rainbow CCTV."

[5] As previously noted, ISO did not submit a copy of the initial complaint with the appellate record. According to Fox's testimony, the press release's description of the allegations in the complaint is "close to a quote right out of the complaint . . . ." Donald was cross-examined with regard to the similarity between the original complaint and the press releases. Donald acknowledged after being presented with a copy of the original complaint that the allegations in the press releases were identical to the allegations in the original complaint.

over the company [in January 2006], but you have to have evidence to file a lawsuit. So then we started going through the process of doing an audit.' [¶] He said, 'our financial records were a mess, so we had to sort that all out. The computer system was basically inadequate, then we had boxes and boxes of paper to go through. Then we have to run a company at the same time.' [¶] Fox was very businesslike about the lawsuit, and said he wasn't about to speculate regarding a possible motivation for a stockholder and his family to embezzle from his own company. 'I can't really say it was malicious or anything like that,' said Fox. [¶] The business continues to go forward . . . . 'Business has been pretty good,' said Fox. 'It has its ups and downs, but overall it's been pretty good. The business has actually had to be very strong to be able to survive this type of thing and keep going.'"

With regard to the article's statement about Fox not speculating about "'a possible motivation for a stockholder and his family to embezzle from his own company,'" Fox testified that "[t]hose were not my words. Those were the interviewer's or the writer . . . of this article."

Donald first saw the press release "way after the suit was filed." Donald saw the article in the trade publication sometime in the summer of 2007. He learned about the article from a business acquaintance. Donald denied he took part in any of the alleged misconduct mentioned in the press releases and article. He specifically noted he has "never embezzled." Donald was "angry, humiliated, [and felt like his] life was ruined" when he read the article. "It's like someone accusing you of doing something that you've never done and put it in a national publication."

ISO moved for directed verdict on the defamation cause of action. ISO's counsel asserted, "There is absolutely no evidence that Mr. Fox ever uttered anything other than the truth. . . . [T]he document itself is a mirror image of the allegations of the complaint. There's no evidence whatsoever that Mr. Bob Fox ever indicated anyone actually committed a tort or a crime of embezzlement." Counsel for Donald focused on

Fox's alleged use of the word "embezzle" in his interview with the trade publication. Counsel for Donald also indicated he thought the jury should be able to "look at the totality of evidence and decide whether this was just a statement of allegations or whether it was trial by press."

The court denied the motion for directed verdict. "[T]he theory of the cross-action is not malicious prosecution, so it's not based on the facts of the complaint. It's on the publication of remarks and as reflected in the press release and the newspaper. So I'm not really sure why there was an attempt to compare the . . . complaint to the press release or the newspaper article, although there was an attempt to do so." "I think, based upon the fact that [the trade publication article] is in evidence, there is evidence from which the jury could conclude that Mr. Fox is not believable with respect to his denial on the witness stand that he was the source of the information or the statements that 'he wasn't about to speculate regarding a possible motivation for a stockholder and his family to embezzle from its own company.' [¶] The inference there is that the personalities mentioned in the article, which are the defendants, engaged in criminal or criminal-like behavior which would be, per se, defamatory, and so it's a question for the jury to decide who they believe."

In his closing argument, counsel for Donald explained that Donald could not prove actual damages, but that Donald was hurt and humiliated. Counsel asked for $1.9 million in assumed damages "because apparently that number was good enough for [Yoshiko] and . . . Fox to start this lawsuit with no proof, with no basis for suing Don[ald] Hamasaki and no basis for saying he embezzled. And four years later they have no proof on that stand."

Evidence Regarding Donald's Unjust Enrichment Claim

In January 2002, Donald loaned ISO $30,000 by way of a personal check with the word "loan" written in the memo line. ISO was having a cash flow problem at

the time. As of 2009, ISO's balance sheet still showed the $30,000 loan as a liability of ISO.

Although he had been repaid in the past for other loans to ISO, this $30,000 loan was never repaid to Donald. There was no deadline for repayment affixed to the loan. But in February 2010, Fox wrote a letter to Donald indicating the loan would not be paid back to Donald because any claim for the debt was barred by the passage of time in which Donald was not repaid principal or interest.

Special Verdict

The jury answered a series of questions contained within a 40-page special verdict form. As to ISO's conversion cause of action, the jury answered "no" to questions asking whether money was "wrongfully paid to" Imtek and FaxPress. The jury answered "yes" to the question of whether money was "wrongfully utilized from checks payable to petty cash," but then answered "yes" to a question asking, "Did ISO give consent to the money wrongfully utilized from checks payable to petty cash." Similarly, the jury found money was wrongfully paid for unreimbursed personal credit card expenses and travel expenses, but found ISO consented to the money being wrongfully paid.

As to ISO's breach of fiduciary duty cause of action, the jury answered "no" to questions asking whether Donald "knowingly act[ed] against the interests of ISO in connection with the payments to" Imtek, FaxPress, the petty cash fund, the personal credit card charges, and the unreimbursed travel expenses.

As a result of its responses to the special verdict questions, which indicate there was no liability on the part of the Hamasakis, the jury did not reach special verdict questions pertaining to damages for conversion and breach of fiduciary duty. Nonetheless, the jury answered the following question: "If you found that ISO suffered economic damages due to the conduct of any of the Defendants, is ISO prohibited from

recovering any portion of those damages from any of the following Defendants because the statute of limitations had expired prior to the filing of the lawsuit on March 28, 2007?" For each of the Hamasakis, the jury answered "yes." In a follow up question, the jury indicated that "all" of ISO's damages were precluded by the statute of limitations. The jury also found ISO waived its right to any damages as to all defendants and failed to mitigate its damages as to all defendants. The jury then specifically stated it was awarding $0 in damages to ISO as to each of the Hamasakis.

As to Donald's defamation claim, the jury found Fox made false statements of fact about Donald; such statements were made while Fox was an agent, employee, or representative of ISO; Fox was acting within the scope of his agency, employment, or representation when he made the statements; and Yoshiko intended for Fox to make the statements. The jury found Donald suffered no actual damages, but awarded $1.9 million "for the assumed harm to his reputation and for shame, mortification or hurt feelings." The jury found Fox acted with malice, oppression, or fraud in making the false statements.

As to Donald's breach of fiduciary duty claim, the jury found Yoshiko and Fox had breached their fiduciary duties and by doing so had injured Donald in the amount of $49,000. As to Donald's unjust enrichment claim, the jury found ISO had been unjustly enriched in the amount of $49,000 at the expense of Donald.

Judgment

The court entered judgment on June 6, 2011, upon the jury's special verdict. But the court later conditionally granted a motion for new trial on Donald's cause of action for defamation unless Donald agreed to a reduction of the jury's verdict from $1.9 million to $250,000. The court found these damages to be "clearly excessive." The court made this finding because the jury's special verdict indicated Donald suffered no actual damages. The court also ruled that "the sole basis for the defamation claim

found true by the jury was that Mr. Fox accused [Donald] of embezzlement which, although defamatory, was listed within a string of accusations stated in the plaintiff's complaint so as to mute its [effect]." The court denied Donald's motion to add Yoshiko as a judgment debtor on the defamation cause of action as an alter ego of ISO.

The court ultimately (on August 16, 2011) entered an amended judgment with the following pertinent language: "1. ISO take nothing by way of its complaint against Donald Hamasaki, Paul Hamasaki, Scott Hamasaki, or Joni Hamasaki; [¶] 2. Donald Hamasaki is awarded $250,000 against ISO . . . for defamation; [¶] 3. Donald Hamasaki is awarded $49,000 against ISO, Yoshiko Oswald and Robert Fox, jointly and severally . . . for breach of fiduciary duty and unjust enrichment, respectively; [¶] . . . [¶] 5. Donald Hamasaki have and recover against ISO, Robert Fox and Yoshiko Oswald, jointly and severally, costs and disbursements in the amount of $21,349.20; [¶] 6. Donald Hamasaki have and recover against ISO attorney's fees in the amount of $269,327.50; [¶] 7. Paul Hamasaki and Scott Hamasaki have and recover against ISO costs and disbursements in the amount of $44,181.64; [¶] 8. Paul Hamasaki and Scott Hamasaki have and recover against ISO attororney's fees in the amount of $693,376.99; [¶] 9. Joni Hamasaki have and recover against ISO costs and disbursements in the amount of $11,226.00 . . . ."

DISCUSSION

This case involves: (1) ISO's appeal of the defense judgment on the complaint; (2) ISO's, Fox's, and Yoshiko's appeal of the damages awarded to Donald on the cross-complaint; (3) Donald's cross-appeal of the court's denial of a motion to amend the judgment to deem Yoshiko an alter ego of ISO; and (4) various parties' assertions with regard to the award of attorney fees and costs that depend upon the resolution of the foregoing issues, as well as motions for sanctions filed by the Hamasakis.

Before addressing each of the issues properly before us, we mention several relevant general rules of appellate practice. "'A judgment . . . is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) To demonstrate prejudicial error, an appellant must provide an adequate record of the trial court proceedings and include specific page citations in its briefs illustrating the error. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132; *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) Issues not specifically raised at trial are forfeited on appeal. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.) Moreover, issues not specifically raised in the appellate briefs are waived. (*Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398, 1410.)

With regard to the parties' multiple claims that the evidentiary record is insufficient to support factual findings underlying the judgment or posttrial orders, we apply the substantial evidence standard of review. "Under the substantial evidence standard of review, 'we must consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.] [¶] It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment.'" (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266.) We note other applicable standards of review below.

I.

ISO'S APPEAL OF DEFENSE JUDGMENT ON THE COMPLAINT

Instruction of Jury With Regard to Corporations Code Section 310

ISO first contends the court erred by refusing to instruct the jury with special instructions prepared by ISO based on Corporations Code section 310 (section 310). "'A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence.'" (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1217.) "'Instructions should state rules of law in general terms and should not be calculated to amount to an argument to the jury in the guise of a statement of law. [Citations.] Moreover, it is error to give, and proper to refuse, instructions that unduly overemphasize issues, theories or defenses either by repetition or singling them out or making them unduly prominent although the instruction may be a legal proposition.'" (*Ibid*.)

"Section 310 governs situations where a matter before a board of directors is one in which a director has an interest." (*Sammis v. Stafford* (1996) 48 Cal.App.4th 1935, 1941.) "Under section 310, subdivision (a), a contract is automatically void or voidable on the ground a director is a party to the contract, unless certain alternative requirements are met. If these requirements . . . are met, the contract is no longer void or voidable on the ground the director is a party thereto." (*Gaillard v. Natomas Co.* (1989) 208 Cal.App.3d 1250, 1273.) Section 310, subdivision (a), states in relevant part: "No contract . . . between . . . a corporation and any corporation, firm or association in which one or more of its directors has a material financial interest, *is either void or voidable . . . if*" one of the following three conditions is satisfied: (1) *formal approval of disinterested shareholders* is obtained after full disclosure of the director's interest; (2) *disinterested directors approve* of the transaction after full disclosure of the interested director's interest and the transaction is "just and reasonable as to the

corporation"; *or* (3) "As to contracts or transactions not approved as provided in paragraph (1) or (2) of this subdivision, *the person asserting the validity of the contract or transaction sustains the burden of proving that the contract or transaction was just and reasonable as to the corporation at the time it was authorized, approved or ratified*."[6] (Italics added.)

Although section 310 contemplates formal shareholder or director approval of interested transactions, case law suggests more informal approval can be sufficient in cases involving closely held corporations. "Where the full details of the entire transaction are known and approved by all persons concerned and the transaction is just and reasonable in the light of the circumstances appearing at the time it was made, no person can properly complain." (*Armstrong Manors v. Burris* (1961) 193 Cal.App.2d 447, 455-456 [shareholder and director approval can occur despite lack of formal meetings or resolutions for purposes of predecessor statute to section 310].)

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[6] Section 310, subdivision (a), states in full: "No contract or other transaction between a corporation and one or more of its directors, or between a corporation and any corporation, firm or association in which one or more of its directors has a material financial interest, is either void or voidable because such director or directors or such other corporation, firm or association are parties or because such director or directors are present at the meeting of the board or a committee thereof which authorizes, approves or ratifies the contract or transaction, if [¶] (1) The material facts as to the transaction and as to such director's interest are fully disclosed or known to the shareholders and such contract or transaction is approved by the shareholders (Section 153) in good faith, with the shares owned by the interested director or directors not being entitled to vote thereon, or [¶] (2) The material facts as to the transaction and as to such director's interest are fully disclosed or known to the board or committee, and the board or committee authorizes, approves or ratifies the contract or transaction in good faith by a vote sufficient without counting the vote of the interested director or directors and the contract or transaction is just and reasonable as to the corporation at the time it is authorized, approved or ratified, or [¶] (3) As to contracts or transactions not approved as provided in paragraph (1) or (2) of this subdivision, the person asserting the validity of the contract or transaction sustains the burden of proving that the contract or transaction was just and reasonable as to the corporation at the time it was authorized, approved or ratified."

ISO claims it was entitled to its proffered instructions, which were based on section 310, because substantial evidence supported findings that: (1) Donald, a director of ISO, was financially interested in Imtek and FaxPress; (2) ISO engaged in a series of transactions with Imtek and FaxPress; and (3) Donald did not sufficiently disclose all material facts to the other shareholders and directors of ISO or obtain formal approval of these transactions. ISO's proposed instructions shifted part of the burden of proof to Donald, specifically on the question of whether the Imtek/FaxPress transactions were "just and reasonable." The burden of proof question was important to ISO precisely because it did not present specific evidence that any particular transaction was unreasonable or unfair.

ISO's first proposed instruction indicated ISO was required to prove: (1) transactions occurred between ISO and Imtek/FaxPress (which was undisputed); (2) Donald acted as a director of ISO and simultaneously had a material financial interest in Imtek/FaxPress (which was largely undisputed, at least with regard to most of the relevant time period); and (3) "[t]he material facts as to the transaction or as to Donald[s'] . . . interest in Imtek and FaxPress, were not fully disclosed, or such contract or transaction was not approved by the other directors or shareholders" (an issue that was disputed by the parties). ISO's second proposed instruction indicated: "A director, who authorizes, approves or ratifies a transaction between the corporation and another entity in which that director has a material financial interest, has the burden of proving that each transaction was just and reasonable as to the corporation at the time it was authorized, approved or ratified, unless the material facts of the transaction and the director's financial interest were (a) fully disclosed or known by the other shareholders and (b) the transactions were approved by the shareholders with the shares owned by the interested

director not entitled to vote. If the director fails to meet that burden, the transactions are void."[7]

The court rejected ISO's proposed instructions and instead provided the jury with its own modified version of CACI No. 4102, the standard duty of loyalty instruction: "ISO claims that it was harmed by Donald Y. Hamasaki's breach of the fiduciary duty of loyalty. To establish this claim, ISO must prove all of the following: [¶] 1. That Donald . . . owed ISO a fiduciary duty; [¶] 2. That Donald . . . knowingly acted against ISO's interests; [¶] 3. That ISO did not give informed consent to Donald['s] . . . conduct; [¶] 4. That ISO was harmed; and [¶] 5. That Donald['s] . . . conduct was a substantial factor in causing ISO's harm." The primary modification was an addendum to the end of the instruction, which appears to have been inspired by section 310: "If Plaintiff has proven the above, Donald . . . must prove it is more likely tha[n] not that the contract or transaction was just and reasonable as to the corporation at the time the transaction occurred."

According to the court, the case as presented to the jury was in some ways a "run-of the-mill breach of fiduciary duty case." ISO pursued Donald for damages based on an alleged breach of the fiduciary duty of loyalty to ISO. ISO did not seek to void its contracts with Imtek and FaxPress and recover from those entities. (See, e.g., *Remillard Brick Co. v. Remillard-Dandini* (1952) 109 Cal.App.2d 405, 416-424.) But at the same time, the court recognized section 310 had some bearing on the case, as the court modified CACI No. 4102 to include a statement that Donald had the burden to prove the Imtek/FaxPress transactions were just and reasonable, if ISO proved the elements of its

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[7] ISO also sought two additional instructions that a "fiduciary has the burden of justifying his or her conduct" and "the burden rests on the fiduciary to show full disclosure, without which the transactions at issue are improper." Although ISO lumps these instructions in with its argument on appeal that the court erred, these instructions add nothing to the question whether the court properly instructed the jury with regard to section 310. We therefore ignore these instructions for purposes of our analysis.

cause of action against Donald. Although ISO clearly objected to the court's refusal to provide ISO's proffered instructions, ISO did not specifically object on the record to the court's modified version of CACI No. 4102 or explain on the trial record why the court's chosen instruction was not sufficient with regard to section 310's burden-shifting mechanism.

The court was correct to base its instruction on CACI No. 4102. To prove Donald breached his fiduciary duty of loyalty, it was necessary for ISO to prove Donald acted against ISO's interests (not merely that there were contracts with Imtek, a company in which Donald held a material financial interest). The transactions at issue occurred from 1993 to 2005, a time period in which Paul was running ISO's operations, not Donald. To hold Donald liable for damages (as opposed to voiding ISO's contracts with Imtek in an action against Imtek), ISO needed to prove wrongdoing by Donald and ensuing damages caused by Donald's wrongdoing. ISO's proposed instructions did not accurately state the law based on the theory of the case pursued by ISO at trial. Thus, the court did not err by refusing to provide ISO's instructions.

It is true that the court's modified CACI No. 4102 instruction, when viewed in tandem with the special verdict form, is unclear. The special verdict form does not include a question asking whether the contracts or transactions with Imtek/FaxPress were just and reasonable. The first question asked of the jury in the fiduciary duty section of the special verdict is whether Donald knowingly acted against the interests of ISO in connection with the payments to Imtek/FaxPress. The jury answered "no" and did not reach any of the other questions. How was the jury supposed to view its task with regard to answering the first question on the special verdict form (i.e., did Donald knowingly act against ISO's interests), in light of Donald's burden to prove the transactions were just and reasonable? Did the jury consider the justness and reasonableness of the transactions in deciding Donald did not knowingly act against the interests of ISO? If so, how did the jury allocate the burden of proof on this question?

In its appellate briefs, ISO claims the jury would have viewed the case differently had it been given an instruction more closely approximating section 310, like those proposed by ISO. ISO's assignment of instructional error is only coherent when combined with a challenge to the instruction provided by the court (modified CACI No. 4102) and the special verdict form. But ISO does not directly argue on appeal that the modified CACI No. 4102 instruction or the special verdict form were given in error. Nor did ISO specifically argue to the trial court that the breach of loyalty instruction and special verdict form were confusing or incomplete. Instead, ISO's argument (both at trial and on appeal) was and is that the court was obligated to give ISO's proposed jury instructions. From the trial court's perspective, ISO's instructions were wrong (and to the extent they were correct, duplicative). ISO never explained to the court on the record why the court's instruction and the special verdict form would be potentially unclear in establishing the burden of proof for the justness and reasonableness of the transactions. Because ISO did not properly preserve a viable argument at trial or advance such an argument on appeal, we need not answer whether instructional/special verdict form error occurred in the abstract.

Even if we were to decide the jury was improperly instructed, we would not reverse the judgment. "[I]nstructional error in a civil case is not grounds for reversal unless it is probable the error prejudicially affected the verdict. [Citation.] In determining whether instructional error was prejudicial, a reviewing court must evaluate '(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.'" (*Major v. Western Home Ins. Co.*, *supra*, 169 Cal.App.4th at p. 1217.) Even assuming the court should have provided ISO's proposed instructions, any error was harmless.

ISO claims the instructional error was prejudicial because the jury "may have very well answered special verdict question nos. 1 and 18 differently, forcing the jury to proceed with" answering the remainder of the special verdict form as to breach of

fiduciary duty. It is true that "giving the wrong party the burden of proof on a dispositive issue . . . when the evidence on that issue is in dispute, is a major instructional error." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 393.) But even in the face of such an error, "we may not reverse a judgment . . . absent a miscarriage of justice." (*Ibid.*; see *In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 736 [even if court misallocated burden of proof, error was harmless].) ISO spends only about one paragraph in its opening brief on the question of whether the error was prejudicial, and ISO's arguments are conclusory and lack citations to the record. ISO simply does not make the case that the jury thought the evidence was in equipoise as to whether the disputed transactions were just and reasonable, which is the only way shifting the burden of persuasion on this issue would have mattered. (*Buzgheia*, at p. 394 [error was not harmless in part because it was "quite probable that the jury utilized the tie-breaking tool necessary to our system of factfinding: When in doubt, find against the party with the burden of proof"].)

To the extent the specific transactions between ISO and Imtek/FaxPress were examined, the only evidence in the record suggests ISO was obtaining favorable treatment from these entities as a result of the influence of the Hamasakis. As previously noted, the jury answered only the first question on each section of the breach of fiduciary duty cause of action: Donald did not knowingly act against the interests of ISO in connection with the payments to Imtek, the payments to FaxPress, the petty cash management, the payment of unreimbursed personal credit card expenses, and the payment of unreimbursed travel advances. The jury clearly rejected ISO's theory of the case, as partly illustrated by the jury's findings on the conversion cause of action that no wrongful payments were made to Imtek/FaxPress and that ISO consented to all other allegedly wrongful payments. The jury apparently believed Donald's relationship with Imtek, his utilization of Imtek's resources, and his utilization of his family members as employees was essential to the formation and development of ISO. The jury also

apparently disbelieved Yoshiko's assertions that she was kept in the dark by the Hamasakis with regard to ISO's transactions and expenditures, as the jury found the affirmative defenses (consent, mitigation of damages) had been proven.

Although not required to do so, the jury also found the statute of limitations precluded ISO from recovering any damages, which further illustrates that any error in the instructions was harmless. The jury was instructed that if it found ISO "suffered damage before March 28, 2004, then [ISO] must prove that its failure to discover the alleged damage before March 28, 2004 was reasonable and that it had no actual or constructive knowledge of facts sufficient to put a reasonable person on notice to inquire." ISO's own documents make clear that all of the payments to FaxPress occurred before 2004 and all but approximately $10,000 of the payments to Imtek occurred before 2004. The jury's findings indicate they thought ISO was on notice of the payments made by ISO to Imtek and FaxPress, and was aware of the relationship between the Hamasakis and Imtek and FaxPress, before March 28, 2004.

Moreover, we see no evidence the jury was confused or that counsel's argument unfairly took advantage of the lack of clarity in the instructions/verdict form. ISO's counsel vigorously argued to the jury that it was Donald's burden to prove each transaction with Imtek and FaxPress was fair and reasonable. In sum, we do not think it reasonably probable that a clearer explanation to the jury that Donald had the burden to demonstrate these transactions were just and reasonable would have changed the jury's verdict.

Sufficiency of the Evidence Supporting the Jury's Special Verdict Findings of Consent

ISO next contends there was insufficient evidence to support the jury's findings that ISO consented to the use of ISO's funds for personal expenses via the petty

cash fund, company credit cards, and travel expense reimbursements.[8] """Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion are the plaintiff's ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages."""" (*Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 45.) "[T]he law is well settled that there can be no conversion where an owner either expressly or impliedly assents to or ratifies the taking, use or disposition of his property." (*Farrington v. A. Teichert & Son* (1943) 59 Cal.App.2d 468, 474; see CACI No. 2100 [including lack of consent as element of plaintiff's case of conversion].)

There is substantial evidence supporting the jury's finding that ISO consented to these transfers. (See *Bank of New York v. Fremont General Corp.* (9th Cir. 2008) 523 F.3d 902, 914-915.) Longstanding practice at ISO included a lack of careful procedures to differentiate between personal and business expenses in the management of the petty cash fund, the company credit cards, and the travel reimbursement program. At all relevant times, ISO was a small company. Records were available at all times for officers and directors of ISO to examine. There is no evidence that the information relied on by ISO in its case-in-chief was hidden from officers and directors of ISO. At no relevant time were measures taken by corporate representatives to change the policies employed at ISO. (See *Virtanen v. O'Connell* (2006) 140 Cal.App.4th 688, 707 [consent can be demonstrated by failure to stop taking of property of which plaintiff was aware].) The jury's verdict reflects its apparent view that although some abuses of sound corporate

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[8] We note that nothing in the jury's verdict suggests that it found a significant number of the petty cash, company credit card, or travel expense transfers to be "wrongful." ISO's presentation at trial and on appeal fails to make a clear case as to which transactions at issue actually were "wrongful" in that they involved individuals benefitting by having personal expenses paid for by ISO. Instead, ISO continues to point to an undifferentiated mass of information, at least some of which represent "wrongful" transfers in the view of the jury.

accounting practices occurred, ISO consented to these abuses or at least failed to show that it did not consent.

Sufficiency of Evidence With Regard to Affirmative Defenses to ISO's Claims

ISO also contends there was insufficient evidence to support the jury's findings as to the Hamasakis' affirmative defenses (statute of limitations, failure to mitigate damages, waiver of damages). The jury found no liability or damages with regard to any of ISO's causes of action, irrespective of the Hamasakis' affirmative defenses. The jury therefore was not obligated to answer questions pertaining to the affirmative defenses. Each of the special verdict questions pertaining to affirmative defenses was prefaced by the following conditional clause: "If you found that ISO suffered economic damages due to the conduct of any of the Defendants . . . ." Despite this logical and explicit negation of the relevance of the affirmative defense questions, the jury answered each affirmative defense question and found ISO was precluded from recovering any damages by each of the affirmative defenses. The jury's findings with regard to affirmative defenses were unnecessary to the judgment and therefore need not be addressed in this appeal (except as noted above in the harmless error analysis of the jury instruction issue).

II.

APPEAL OF JUDGMENT ON CROSS-COMPLAINT

Effect of Statute of Limitations on Defamation Claim Against ISO

The statute of limitations for libel or slander actions is one year. (Code Civ. Proc., § 340, subd. (c).) Donald did not file his initial cross-complaint until December 2008, more than one year after the publication of the April 2007 press release and June 2007 article, which provided the factual basis for Donald's defamation claim

against ISO. Donald testified he first saw the article in the summer of 2007. Based on the timeline of events, ISO claims Donald should have been barred from pursuing his defamation action.[9] According to Donald, his defamation claim against ISO was preserved because ISO had filed a complaint against Donald, thereby tolling the statute of limitations with regard to Donald's claims against ISO. (See, e.g., *Boyer v. Jensen* (2005) 129 Cal.App.4th 62, 69-70 (*Boyer*).)

ISO's contention on appeal is two-fold: (1) the statute of limitations for unrelated causes of action, i.e., permissive rather than compulsory cross-complaints, is not tolled by the filing of a complaint; and (2) Donald's defamation cause of action was permissive because it was not related to ISO's complaint. A "'related cause of action'" — i.e., "a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint" (Code Civ. Proc., § 426.10, subd. (c)) — must be pleaded in a cross-complaint or not at all (hence, it is a compulsory cross-complaint). (Code Civ. Proc., § 426.30, subd. (a).) The word "'transaction' is construed broadly" to include claims that have a "'logical relationship'" between them such that the litigation of both claims in a single case would avoid the "'duplication of time and effort.'" (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 960 (*Align*).) Even if a cause of action is unrelated to the complaint, a defendant may file a permissive cross-complaint against the plaintiff(s): "A party against whom a cause of action has been asserted in a complaint or cross-

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[9] Strangely, the operative cross-complaint names only Fox as a defendant to this cause of action, but the judgment names only ISO as a judgment debtor with regard to defamation damages. The briefs do not point to anything in the record explaining this oddity. The court indicated in a later order that it had "previously held that the defamation claim is time-barred as to both [Fox and Yoshiko]." Perhaps the court allowed an amendment of the cross-complaint to allow Donald's claim against ISO to proceed to trial. Regardless, any argument that ISO could not be named as a judgment debtor because it was not initially named as a defamation defendant in the operative cross-complaint is forfeited.

complaint *may* file a cross-complaint setting forth either or both of the following: [¶] (a) Any cause of action he has against any of the parties who filed the complaint . . . against him. . . ." (Code Civ. Proc., § 428.10, italics added.)

It is clear, at a minimum, that the filing of a complaint tolls the statute of limitations for any cause of action required to be brought by the defendant against a plaintiff in a *compulsory* cross-complaint. (See Rylaarsdam and Turner, Cal. Practice Guide: Civil Procedure Before Trial Statutes of Limitations (The Rutter Group 2012) ¶ 8:240, p. 8-30; Weil and Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 6:592, p. 6-152 ["A cross-complaint that is *subject-matter related* to the plaintiff's complaint (i.e., a compulsory cross-complaint) 'relates back' to when the action was commenced for statute of limitations purposes"].) The principle underlying the rule is that """"*the plaintiff* has [by filing the complaint] thereby waived the [statute of limitations] claim and permitted the defendant to make all proper defenses to the cause of action pleaded.'"" [Citations.] Since new parties cannot be said to have engaged in any sort of waiver, the rule does not apply to them." (*Boyer*, *supra*, 129 Cal.App.4th at pp. 69-70.) Thus, the court ruled that the statute of limitations had run with regard to a claim against Fox and Yoshiko, but not against ISO.

According to some authorities, "[i]t is not clear whether the . . . rule [tolling the running of the statute of limitations upon filing of a complaint] applies to cross-complaints against plaintiff *unrelated* to 'the contract, transaction, matter, happening or accident' alleged in the complaint ([Code Civ. Proc., § 428.10, subd. (a)]) (so-called 'permissive' cross-complaints)." (Rylaarsdam and Turner, *supra*, ¶ 8:250, p. 8-31; see also Weil and Brown, *supra*, ¶ 6:595, p. 6-153.)

The leading case cited for the proposition that the filing of a complaint tolls the statute of limitations only for related actions is *Trindade v. Superior Court*, *supra*, (1973) 29 Cal.App.3d 857 (*Trindade*). Quoting former Code of Civil Procedure section 442, a since repealed statute pertaining to cross-complaints, *Trindade* observed: "It has

consistently been held that the commencement of an action tolls the statute of limitations as to a defendant's then unbarred cause of action against the plaintiff, 'relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, . . .'" (*Trindade*, at p. 860; see Weil and Brown, *supra*, ¶ 6:595, p. 6-153 [citing *Trindade* for proposition that "[n]o 'waiver' of the statute of limitations can be inferred as to *unrelated* cross-complaints"].)

Other appellate courts have also stated the rule to seemingly restrict its applicability to related causes of action. (*Boyer*, *supra*, 129 Cal.App.4th at p. 69 [by filing complaint, plaintiff "tolled or suspended [the statute of limitations] as to causes of action arising out of the same set of facts alleged in the complaint"]; *Sidney v. Superior Court* (1988) 198 Cal.App.3d 710, 714 ["Such a cross-complaint need only be subject-matter related to the plaintiff's complaint — i.e., arise out of the same occurrence (see §§ 426.10, 428.10) — to relate back to the date of filing the complaint for statute of limitation purposes"]; *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 844 ["the courts have fashioned a rule that a statute of limitations is suspended or tolled as to a *defendant's* then unbarred causes of action against the plaintiff arising out of the same transaction by the filing of the plaintiff's complaint"].) But neither *Trindade* nor any other case has actually had cause to decide whether the waiver-by-complaint rule applies to claims that could only be brought as permissive (rather than compulsory) cross-complaints.

Our Supreme Court has arguably stated the rule more broadly. (See *Jones v. Mortimer* (1946) 28 Cal.2d 627, 633 ["The statute of limitations is not available to plaintiff as to defendants' counterclaim if the period has not run on it at the time of commencement of plaintiff's action even though it has run when the counterclaim is pleaded"]; *Union Sugar Co. v. Hollister Estate Co.* (1935) 3 Cal.2d 740, 746 ["'The filing of the complaint . . . operated to suspend the running of the statute of limitations as to any counterclaim existing at that date in favor of respondent, and therefore the

counterclaim . . . was not barred"].) These cases, of course, had no cause to consider the modern distinction between compulsory and permissive cross-complaints. But by referring to "counterclaims" (a category "abolished" in 1971 in favor of the cross-complaint (Code Civ. Proc., § 428.80)), our Supreme Court's statement of the rule included claims with a "scope . . . much broader than that of the cross-complaint" defined under former Code of Civil Procedure section 442. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1155, p. 582.) Under prior versions of the Code of Civil Procedure, "[a] cross-complaint [could] be filed only when the affirmative relief sought by defendant constitute[d] a claim 'relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought.' [Citation.] Since 1927 [and until it was abolished in 1971] there [was] no comparable limitation upon the counterclaim, which merely need tend to diminish or defeat plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action." (*Holtzendorff v. Housing Authority* (1967) 250 Cal.App.2d 596, 635-636.) Thus, under prior law, "counterclaims" included actions that might now be classified as permissive cross-complaints.

A broader statement of the waiver-by-complaint rule is also reflected in some treatises, although these treatises do not explicitly consider whether the rule is limited to compulsory cross-complaints. (30 Cal. Forms of Pleading and Practice (Matthew Bender 2012) § 345.20(5)(h) ["If, when a complaint is filed, an action that may be raised on a cross complaint is not already time barred, the filing of the complaint suspends the running of the statute of limitations as to the action that may be raised as a cross complaint"]; 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 448, p. 571 ["The statute is a bar to the defendant's affirmative claim only if the period has already run when the complaint is filed. The filing of the complaint suspends the statute during the pendency of the action, and the defendant may set up his or her claim by appropriate pleading at any time"].)

Given the arguably broader statement of the rule by the California Supreme Court and the lack of a clear holding in any case that the rule is restricted to compulsory cross-complaints, we conclude the statute of limitations tolled with regard to Donald's defamation cause of action against ISO, regardless of whether the defamation cause of action should be deemed compulsory or permissive.[10]

Obtaining Defamation Judgment Against ISO Based on Fox's Statements

ISO also claims it cannot be held vicariously liable for Fox's statements because the statute of limitations had run against Fox. (See Civ. Code, § 2338 ["a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business"]; *Lehmuth v. Long Beach Unified Sch. Dist.* (1960) 53 Cal.2d 544, 550 ["where recovery of damages is sought against a principal and an agent, and the negligence of the agent is the cause of the injury, a verdict releasing the agent from liability releases the principal"].)

ISO's argument is off base. The judgment supports a conclusion that ISO was held *directly liable* (rather than merely vicariously liable) for defamation. The

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10 We need not address the difficult (and for our purposes academic) question of whether a defamation cause of action based on *postcomplaint utterances* about the allegations in the complaint is compulsory or permissive. Some federal cases, applying Federal Rule of Civil Procedure 13(a), indicate that "a counterclaim which stems from the filing of the main action and *subsequent* alleged defamations is not a compulsory counterclaim covered by Rule 13(a)." (*Harris v. Steinem* (2d Cir. 1978) 571 F.2d 119, 124, fn. omitted; see also *Computer Associates Intern., Inc. v. Altai, Inc.* (2d Cir. 1990) 893 F.2d 26, 29; *Pochiro v. Prudential Ins. Co. of America* (9th Cir. 1987) 827 F.2d 1246, 1251, fn. 9 [describing distinction between precomplaint and postcomplaint defamatory statements].) On the other hand, there is a logical relationship between Donald's defamation cause of action and ISO's complaint. And Code of Civil Procedure section 426.30 asks whether the defendant has a "related cause of action" against the plaintiff "at the time of serving his answer to the complaint," not at the time of the filing of the complaint. (*Ibid*.; see, *Align*, *supra*, 179 Cal.App.4th at pp.959-960.)

evidence supports a finding that Fox was ISO's general manager as of November 2005. The jury found Yoshiko (a director and the controlling shareholder of ISO) was aware of and authorized Fox's press releases and public statements. This suggests the judgment against ISO was not dependent on respondeat superior principles of vicarious liability. Instead, ISO was directly liable for defamation because it authorized the wrong committed by Fox. (Civ. Code, § 2339 ["A principal is responsible for no other wrongs committed by his agent than those mentioned in the last section, unless he has authorized or ratified them"]; *Benson v. Southern Pacific Co.* (1918) 177 Cal. 777, 779-780 ["All intendments being in favor of the verdict, it must be considered that the jury" found the corporate entity to be directly liable even though the agent was not held liable, thereby precluding vicarious liability].)

Reasonableness of $250,000 in Defamation Damages

ISO does not contend on appeal that there is insufficient evidence to support the jury's finding of liability for defamation per se (i.e., matter which is libelous on its face for which a plaintiff need not prove special damages). (See Civ. Code, §§ 44-47.) We therefore assume, without deciding, that Fox's statements were sufficient as a matter of law to support a finding of defamation liability.

ISO does contend that $250,000 was an unreasonable amount of damages for the allegedly defamatory statements at issue, notwithstanding the trial court's reduction of the damage award from $1.9 million. ISO claims the evidence supported only an award of nominal damages. (See Civ. Code, §§ 3359 ["Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered"], 3360 ["When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages"].)

"'It is well settled that damages are excessive only where the recovery is so grossly disproportionate to the injury that the award may be presumed to have been the result of passion or prejudice. Then the reviewing court must act. [Citations.] The reviewing court does not act de novo, however. . . . [T]he trial court's determination of whether damages were excessive "is entitled to great weight" because it is bound by the "more demanding test of weighing conflicting evidence than our standard of review under the substantial evidence rule. . . ."'" (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1470-1471 (*Sommer*).)

ISO does not contend the jury instruction pertaining to the issue of assumed damages (a modified version of CACI No. 1704) was provided in error. As to assumed damages, this jury instruction provided: "Even if Donald Hamasaki has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings, the law assumes that he has suffered this harm. Without presenting evidence of damage, Donald Hamasaki is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar." (See *Sommer*, *supra*, 40 Cal.App.4th at pp. 1472-1473 [approving a similar BAJI instruction].) Problematically, the jury instruction indicated that any of the alleged false statements made by ISO, including those which merely relayed the allegations of the complaint, could give rise to defamation liability and assumed damages for defamation per se.

In our view, the trial court wisely reduced the damages to reflect its belief that the jury had improperly punished ISO for bringing an unmeritorious lawsuit against Donald. This was not a malicious prosecution action, although at times Donald tried to litigate it that way. The court honored the jury's verdict to the extent possible by deeming $250,000 to be a reasonable estimate of assumed damages suffered by Donald as a result of being accused of embezzlement in a trade publication related to his line of work. We will not second guess the court's attempt to reach a reasonable outcome on this point, particularly in light of the dearth of authority provided by ISO for doing so.

Sufficiency of Evidence to Support Award of $49,000

ISO, Fox, and Oswald also challenge the $49,000 awarded to Donald for breach of fiduciary duty and unjust enrichment.[11] The parties agree the judgment correctly reflects the jury's intention to award only $49,000 total on these causes of action, and not $98,000, despite the special verdict form including separate $49,000 awards. The parties also agree that the basis for these damages is the $30,000 loan that was not repaid by ISO to Donald. ISO, Fox, and Yoshiko argue this award should be reduced to $30,000. Fox and Oswald posit the award should only be against ISO because Fox and Oswald did not borrow the money. Donald claims there is a basis for the award against all three appellants: "7% simple interest on $30,000 for the nine-plus years the loan was unpaid results in total interest of roughly $19,000, and Exhibit 218 shows that the 7% figure was applied to prior loans made to ISO." Exhibit 218 is a 1993 letter from an accountant to Paul stating that Yoshiko had provided instructions to utilize a 7 percent per annum interest rate for shareholder loans made to the company in 1993. None of the briefs cite any legal authority for their positions on the issue of whether a jury's verdict can be supported by inferring a reasonable rate of interest on a loan that was not repaid.

With regard to the liability of Fox and Yoshiko, it is an established principal of corporate law that "majority shareholders, either singly or acting in concert to accomplish a joint purpose, have a fiduciary responsibility to the minority and to the corporation to use their ability to control the corporation in a fair, just, and equitable manner. Majority shareholders may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority." (*Jones v. H.F.*

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[11] Although classified as an unjust enrichment cause of action, the cause of action that specifically referenced $30,000 in damages was actually more like a common count for money had and received. Unjust enrichment is not a cause of action in California; it is instead synonymous with circumstances in which a plaintiff is entitled to a restitution remedy. (See *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793.)

Ahmanson & Co. (1969) 1 Cal.3d 93, 108; see also *Steinberg v. Amplica, Inc.* (1986) 42 Cal.3d 1198, 1210 [noting "the strong public interest in assuring that corporate officers, directors, majority shareholders and others are faithful to their fiduciary obligations to minority shareholders"].) There is substantial evidence that Yoshiko (the controlling shareholder in 2009 and 2010) and Fox (her son and general manager of ISO) used their control of ISO to unfairly refuse to repay Donald's loan as part of a strategy to oust Donald from his ownership of ISO and benefit themselves at the expense of Donald. There is no obstacle to Yoshiko and Fox being held jointly liable for these damages.

With regard to the amount of damages, the jury's award is supported by substantial evidence. The evidence is not particularly strong. The amount owed to Donald was $30,000. The balance sheets state the principal amount owed as $30,000, even after the loan had been on ISO's books for seven years. There is no evidence the parties specifically agreed to an interest rate on the loan and Donald did not testify he expected interest to be paid on the loan. Moreover, there is no evidence in the record suggesting the parties ever agreed to a date certain on which the loan needed to be repaid or renegotiated. But there is some historical evidence that prior loans had an explicit seven percent interest rate. In the context of a closely held corporation in which shareholders periodically loaned money to the corporation, this evidence is sufficient for the jury to apply a seven percent interest rate to the loan.

III.

DONALD'S CROSS-APPEAL OF POSTJUDGMENT ORDER

Order Denying Finding of Alter Ego Liability for Yoshiko

The court denied Donald's postjudgment motion to amend the judgment to name Yoshiko as a judgment debtor equally liable for the defamation damages under alter ego principles. The court indicated it "was not asked at the trial to make a finding

whether the individual defendants were the alter egos of the corporation. Thus, no finding has ever been made on the alter ego theory of liability. [¶] If the defendant is asking the court to make the alter ego finding here in this motion [in] the first instance, then the court finds that the defendant has not carried his burden of persuasion that [Yoshiko] is the alter ego of ISO. . . . This court finds that the totality of the evidence adduced at trial does not weigh in favor of ignoring the concept of corporate independence and limited shareholder liability."

There are multiple procedures available to litigants seeking to pierce the corporate veil of an opponent. "The alter ego issue is ordinarily raised by the pleadings, either affirmatively in the complaint [citation] or negatively in the answer [citation]. Nonetheless, even when not pleaded, that issue may be resolved at trial [citations], at a hearing to determine the true identity of the judgment debtor [citations], or even in a separate action subsequent to the action against the fictitious corporate defendant." (*Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal.App.3d 1351, 1358; see Ahart, Cal. Practice Guide: Enforcing Judgments and Debts (The Rutter Group 2012) ¶ 6:1575, p. 6G-78 [in postjudgment context, judgment creditor may file noticed motion, apply for order to show cause, or file separate action].) Amendment of the judgment to include an alter ego judgment debtor "is an equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant." (*NEC Electronics, Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778.)

Here, on June 14, 2011 (about one week after the entry of the initial judgment and two months before the entry of the amended judgment reducing the defamation damages to $250,000), Donald elected to file a noticed motion to amend the judgment to name Yoshiko as a judgment debtor with regard to defamation damages. The motion featured: (1) a two-page notice indicating the relief sought; (2) a five-page memorandum of points and authorities; and (3) a short attorney declaration appending a

copy of the special verdict form. Much of the memorandum of points and authorities pertains to an alternative argument that is not argued on appeal (to wit, that Yoshiko could be held directly liable for Fox's defamatory conduct because the jury found she approved of Fox's conduct). There is no evidence appended to the motion. Instead, the motion simply refers to a few items of evidence purportedly admitted at trial (without citations to a record or exhibit numbers). Donald explained in his reply brief on the motion to amend the judgment that he saw no need to "spend significant time revisiting the evidence at trial."

Donald's use of the postjudgment noticed motion procedure in the instant case was unorthodox, to say the least. For one, Yoshiko was a party to the action, not a third party brought into the case only when it was discovered that the judgment debtor did not have assets. Second, Donald's operative cross-complaint included alter ego allegations with regard to Yoshiko, Fox, and ISO, suggesting that the question of alter ego liability could have been pursued throughout the case by Donald. Third, despite the foregoing facts, the question of alter ego liability was not raised with the court for determination at the time of trial. And fourth, Donald did not develop a postjudgment record relating to the enforceability of the judgment; he simply filed his noticed motion to amend the judgment immediately after judgment was entered.

Given the circumstances, we question whether principles of equity support using the post-judgment noticed motion procedure in this case. (See Ahart, *supra*, ¶ 6:1564, p. 6G-74 ["Occasionally, a judgment creditor obtains a judgment against a corporation only to discover later that the corporation has few or no assets and is controlled by a nonparty *alter ego*. In this event, the judgment creditor may be able to amend the judgment to add the alter ego as a judgment debtor"].) Questions of fact (like whether a majority shareholder is the alter ego of a corporation) should ordinarily be resolved through a trial, not motion practice. And if motion practice is used, a party should not simply refer back to evidence received at a trial conducted for other purposes.

Instead, evidence should be marshaled in support of the motion through the ordinary methods (declarations, requests for judicial notice, requests to present oral testimony at a motion hearing, etc.).

Notwithstanding our reservations concerning Donald's choice to raise the question of alter ego liability in the manner he did, the court reached the merits of the question and based its ruling denying the motion to amend the judgment on a finding that the trial record as a whole did not support the imposition of alter ego liability. A trial court has discretion under Code of Civil Procedure section 187 to amend a judgment to add an additional judgment debtor if it is demonstrated: (1) the targeted third party is the alter ego of the judgment debtor; and (2) the third party controlled the underlying litigation. (*Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 508-509.) A third party is the alter ego of a corporation when: (1) there is "'"unity of interest and ownership"'" between the third party and the corporation; and (2) "'"an inequitable result will follow"'" if the corporate form is respected. (*Minton v. Cavaney* (1961) 56 Cal.2d 576, 579.)[12] Typically, inequitable conduct includes the use of the corporate form to avoid payment of a judgment, performance on a contract, or regulatory statutes. (See 9

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[12] Because the alter ego doctrine is inherently case specific, any list of applicable factors is necessarily nonexhaustive. Factors enumerated by *Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, include "[c]ommingling of funds and other assets," "the unauthorized diversion of corporate funds or assets to other than corporate uses," the failure to issue stock, "the failure to maintain minutes or adequate corporate records," "the holding out by an individual that he is personally liable for the debts of the corporation," "sole ownership of all of the stock in a corporation by one individual or the members of a family," "the failure to adequately capitalize a corporation," "the total absence of corporate assets, and undercapitalization," "the use of a corporation as a mere shell, instrumentality or conduit," "the concealment and misrepresentation of the identity of the responsible ownership," "the disregard of legal formalities and the failure to maintain arm's length relationships among related entities," "the diversion of assets from a corporation by or to a stockholder," and "the contracting with another with intent to avoid performance by use of the corporate entity as a shield against personal liability." (*Id*. at pp. 838-840.)

Witkin, Summary of Cal. Law (10th ed. 2005) Corporations, §§ 11-13, pp. 789-791.) "'Control of the litigation sufficient to overcome due process objections may consist of a combination of factors, usually including the financing of the litigation, the hiring of attorneys, and control over the course of the litigation.'" (*NEC Electronics, Inc. v. Hurt*, *supra*, 208 Cal.App.3d at p. 781.) "Whether the evidence has established that the corporate veil should be ignored is primarily a question of fact which should not be disturbed when supported by substantial evidence." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1248.)

As noted above, Donald did not effectively marshal evidence in his motion. The minimal evidence referred to in the motion, if accurately described, tended to prove the unity of interest prong of the alter ego analysis (e.g., lack of corporate formalities, high percentage of stock ownership by Yoshiko). But there was also evidence admitted at trial that there was not a unity of interest (e.g., Donald's ownership of 30 percent of the company, the lengthy period in which ISO operated as a real business). More importantly, there was no attempt in the motion to demonstrate that an inequitable result would follow if the court did not exercise its discretion to amend the judgment. For instance, the motion did not attempt to prove ISO had insufficient funds to pay the judgment because Yoshiko had removed assets from ISO in anticipation of the judgment. Substantial evidence supports the court's factual findings and the court was therefore within its discretion when it denied Donald's motion to amend the judgment.

Request for Judicial Notice

Donald also asks this court to take judicial notice of documentation suggesting that attempts to enforce the judgment against ISO have been stymied by security interests taken in ISO's property by Yoshiko. The request for judicial notice includes copies of the relevant security agreements, UCC financing statements, promissory notes, loan schedules, written consent of the board of directors of ISO (at the

time, Yoshiko and Fox), and documents filed with the court as part of the judgment enforcement proceedings. Donald claims the materials submitted to this court should influence our assessment of whether the court erred in denying Donald's motion to amend the judgment. Obviously, this material (had it been submitted with the motion to amend the judgment) would have some bearing on whether it would be equitable to pierce the corporate veil and hold Yoshiko accountable for Donald's judgment against ISO.

Donald acknowledges the general rule — appellate courts should not consider matters not presented to the trial court. (See, e.g., *Coy v. County of Los Angeles* (1991) 235 Cal.App.3d 1077, 1083, fn. 3.) But he claims "exceptional circumstances" are presented in this case. (*Goehring v. Superior Court* (1998) 62 Cal.App.4th 894, 910, fn. 5; see also Code Civ. Proc., § 909 [court of appeal may receive new evidence "for any other purpose in the interests of justice"].) Donald asserts this newly discovered evidence should result in a reversal of the court's denial of his motion to amend the judgment.

We deny Donald's request for judicial notice. Trial courts are authorized to amend the judgment to add an alter ego as a judgment debtor if the facts and the equities justify such a remedy. Even if we were to take judicial notice of this new evidence, we would not second guess the court's discretionary ruling, which was based on the entire record and not one particular piece of evidence. We express no view with regard to whether Donald or the other Hamasakis still have the ability to pursue Yoshiko for alter ego liability.

IV.

ATTORNEY FEES AND COSTS ISSUES

Paul and Scott

In their appellate briefs, Paul and Scott highlight the lack of a challenge to the portion of the judgment ordering ISO to pay the Hamasakis' attorney fees pursuant to Corporations Code section 317, subdivision (d), which provides for indemnification of corporate agents who have successfully defended an action brought by the corporation. We agree. There is nothing for this court to review with regard to the court's award of attorney fees to the Hamasakis.

Motions for Sanctions

Donald and Joni each separately move for sanctions against ISO and its appellate counsel, claiming ISO's appeal is frivolous, fails to comply with appellate rules (in that ISO's briefs do not adequately describe the trial record), and is motivated by a desire to delay the case or harass the Hamasakis. (Code Civ. Proc., § 907; Cal. Rules of Court, rule 8.276.) We deny the motions for sanctions. Although unmeritorious, ISO's contentions on appeal were not objectively or subjectively frivolous. "An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) "[C]ounsel must have the freedom to file appeals on their clients' behalf without the fear that an appellate court will second-guess their reasonable decisions." (*Id*. at p. 648.)

DISPOSITION

The judgment is affirmed. The postjudgment order denying Donald Hamasaki's motion to amend the judgment to name Yoshiko Oswald as an alter ego

judgment debtor of ISO is affirmed. Donald Hamasaki's request for judicial notice is denied. Donald Hamasaki's and Joni Hamasaki's motions for sanctions are denied. Donald Hamasaki, Paul Hamasaki, Scott Hamasaki, and Joni Hamasaki shall recover costs incurred on appeal from ISO.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.